Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Ways to Further Section 257 Mandate	)	
and to Build on Earlier Studies	)	MB 04-228
	)	

To The Media Bureau

COMMENTS OF MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

I. Introduction

On June 15, 2004, the Federal Communication Commission (the "Commission" or the "FCC") Media Bureau (the "Bureau") issued Public Notice DA 04-1690 seeking comment on ways to further the mandate contained in Section 257 of the Telecommunications Act of 1996, 47 U.S.C. § 257, which directs the Commission to identify and eliminate market entry barriers for small telecommunications businesses, and Section 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(j), which requires the Commission to create meaningful opportunities for small businesses and businesses owned by women and minorities to provide spectrum-based services. In particular, the Bureau sought comment on constitutionally

permissible ways to further these statutory directives in light of *Grutter v. Bollinger*, *Gratz v. Bollinger* and six recent studies on market entry barriers and diversity of programming issues. 1/

In preparation for these comments, the Minority Media and Telecommunications Council ("MMTC") secured the assistance of Thomas J. Henderson, former Chief Counsel of the Lawyers Committee for Civil Rights, and an expert on constitutional affirmative action jurisprudence, Allen S. Hammond, IV, Professor of Law, Santa Clara University School of Law, and the author and co-author of numerous studies on the nexus between minority ownership and minority-oriented programming, and Catherine J.K. Sandoval, Assistant Professor of Law, Santa

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1/ *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). The studies upon which the Bureau sought comment are:

1. Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming? (referred to as the "Content/Ownership Study");

2. Study of the Broadcast Licensing Process, consisting of three parts: History of the Broadcast Licensing Process; Utilization Rates, Win Rates and Disparity Ratios for Broadcast Licenses Awarded by the FCC; and Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC (referred to as the "Broadcasting Licensing Study");

3. FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions (referred to as the "Auction Utilization Study");

4. Study of Access to Capital Markets and Logistic Regressions for License Awards by Auctions (referred to as the "Capital Markets and Auctions Regression Study") *aka* "Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes;"

5. Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present (referred to as the "Historical Study"); and,

6. When Being No. 1 Is Not Enough: the Impact of Advertising Practices On Minority-Owned & Minority-Formatted Broadcast Stations (referred to as the "Advertising Study") (released January, 1999).

Clara University School of Law, and former Chief of the Commission's Office of Communications Business Opportunities. MMTC respectfully submits these comments, which include in Attachments A and B respectively the declarations of Mr. Henderson and Professors Hammond and Sandoval.

II. The Current State of Minority Ownership of Spectrum Licenses (Broadcast and Non-Broadcast) is Unacceptable and Inconsistent with the Requirements of Sections 257 and 309(j)

MMTC believes that the Media Bureau is wise to seek comment on the issues raised in the Public Notice. Our nation's communications sector contributes a tremendous portion of the gross national product, and yet the level of participation by minorities in the sector is abysmal. Although one-quarter of the nation's population is made up of racial or ethnic minorities, such individuals own only approximately 1.2% of the equity in the broadcast industry, one of the industries that is most important to our nation's democracy. While the number of minority-owned radio stations has increased recently, it still remains extremely low – just north of 4% of all stations. 2/ Moreover, the number of minority radio licensees is decreasing. 3/ In television, the number of minority-owned full power stations has dropped from 33 to 24 in the years since the Commission deregulated local television station ownership. In wireless, minorities remain significantly underrepresented, as the Commission itself has recognized in

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2/ Kofi Ofori, "Radio Local Market Consolidation and Minority Ownership" (Ofori & Associates, March, 2002) ("Consolidation and Minority Ownership"), which may be found in the Comments of MMTC in MM Docket No. 01-317 (Radio ownership) (filed May 8, 2002) ("MMTC Radio Ownership Comments"), Appendix 1, pp. 10-12. If this rate of growth (from 3.2% to 4.1% in five years) is maintained, and the minority percentage of the population does not rise above its current level (26.3%), it will take 123 years (until 2106 A.D.) for minorities to reach ownership parity. Even that is optimistic, since the percentage of minorities in the population will exceed 50% by about 2050.

3/ *Id.*

forming the Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Advisory Committee"). 4/

The dismal state of minority participation in the provision of spectrum-based services threatens to undermine the progress that has been made in bringing minorities into the political and economic mainstream in this country. Thankfully, the Commission has several tools at its disposal to reverse the current situation. As discussed in more detail below, and as the Section 257 studies bear out, creatively structured race-based and race-neutral policies can be crafted to increase the participation of minorities in spectrum-based services, as intended by Sections 257 and 309(j).

III. Race-Conscious Measures Require A Compelling Interest.

It is well-established that any government program involving the use of race must meet strict scrutiny: it must be based on a compelling interest and must be narrowly tailored to that interest. 5/ Thus far, the Supreme Court has identified two interests as sufficiently "compelling" to satisfy the first element of this standard: remedying the effects of past and present discrimination and achieving the benefits of diversity in admissions to institutions of

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4/ *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2000, Resident Population by Race* at 17 (indicating a rise in minority population from 20% to 29% from 1980 to 2000, and projecting a rise to almost 35% by 2015); Advisory Committee on Diversity in the Digital Age Holds Inaugural Meeting: Defines Mission, *FCC News Release* (Sept. 30, 2003).

5/ *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Grutter*, 539 U.S. at 326.

higher learning. 6/ The potential for other interests to be recognized as compelling remains, and has been recognized by the lower courts. 7/

To that end, MMTC submits that with proper support and substantiation of the sort provided in the Section 257 and other relevant studies, there are at least four compelling interests that could potentially be furthered by race-conscious Commission policies: (1) obtaining the educational and informational benefits (including increased viewpoint diversity) that flow from increased minority spectrum license ownership; (2) remedying the effects of past and present discrimination; (3) promoting universal service; and (4) promoting competition in the provision of spectrum-based services. Each is discussed in more detail below.

A. Enhancing Viewpoint Diversity By Promoting Diversity in Spectrum License Ownership

A decade ago, the Supreme Court declared that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." 8/ Indeed, "it has long been a basic tenet of

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6/ *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494-502, 509 (1989); *Grutter*, 539 U.S. at 328-329.

7/ *See, e.g., Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2004) (recognizing operational need for diverse police force as compelling interest), *cert. denied*, 124 S. Ct. 2426 (2004); *Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 964 (9th Cir. 2004) (extending *Grutter* to high school admissions); *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996) (state has a compelling interest in safe and proper functioning of its boot camps); *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp.2d 328, 375-377 (D. Mass. 2003) (school district has compelling interest in promoting racial and ethnic diversity, increasing educational opportunities for all students, and ensuring safety).

8/ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663-664 (1994). The Supreme Court has also counseled that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" 9/

In *FCC v. National Citizens Committee for Broadcasting*, the Supreme Court recognized that the Commission could conclude, based on its power to regulate broadcasting in the "public interest," that the maximum benefit to the public interest flows from allocation of broadcast licenses so as to promote diversification of the mass media as a whole. 10/ In fact, as the Supreme Court further explained, "'[t]he 'public interest' standard necessarily invites reference to First Amendment principles.'" 11/ The Commission has been committed to the concept of diversity because "diversification ... is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of [television and radio] facilities." 12/

9/ *Id.* (internal quotation omitted); *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189-190 (1997)("promoting the widespread dissemination of information from a multiplicity of sources" is "an important governmental interest").

10/ *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 794-795 (1978).

11/ *Id.* at 795 (*quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973)). Congress has also expressly recognized the importance of promoting a diversity of media voices through specific and proactive Commission policies. Section 257 mandates that the Commission identify and eliminate market entry barriers in the provision and ownership of telecommunication services and information services so as to promote, inter alia, "diversity of media voices." 47 U.S.C. § 257(b). This endorsement of the Commission's long standing policies in favor of promoting diversity of media voices provides further support for the contention that the promotion of viewpoint diversity is a compelling governmental interest.

12/ *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d, 393, 394 (1965) ("1965 Policy Statement"). The concept of broadcast diversity developed from the mission and experience of the FCC and its licensing processes and practices. *See* History of the Broadcast Licensing Process Section 257 Study, at 4-5; 1965 Policy Statement; *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978) (providing that minority ownership and participation in management would be considered as a "plus" to be weighed with all other relevant factors in comparative hearings). The rationale for broadcast diversity was

The Commission's interest in promoting viewpoint diversity requires that it seek to ensure that the viewpoints of minorities, a growing segment of the nation's population, are adequately represented over the airwaves. The Commission "has traditionally considered the under-representation of minority viewpoints as detrimental to minorities and the general public" and has taken steps to enhance minority spectrum license ownership "with the intent of thereby increasing the diversity in the control of the media and thus diversity in the selection of available programming, benefiting the public and serving the principle of the First Amendment." 13/ Furthermore, the Commission has recognized that "minorities and women have experienced serious obstacles in attempting to participate in the telecommunications industry and that their greater participation would enhance the public interest." 14/

Although focused on student diversity in higher education, the Supreme Court's decision last year in *Grutter* provides support for the notion that, where a documented nexus exists between minority ownership and the dissemination of minority viewpoints, the Commission has a compelling interest in increasing minority ownership. In *Grutter*, the

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originally premised in part upon the recognition that "the views of racial minorities continue to be inadequately represented in the broadcast media .... [a] situation is detrimental not only to the minority audience but to all of the viewing and listening public," and that "[a]dequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience .... [and] enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Id.*, at 980-981 (footnotes omitted).

13/ *In the Matter of Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, Policy Statement and Notice of Proposed Rulemaking, GD 82-797, 92 FCC 2d 849-850 (1982).

14/ *See In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Report*, GN Docket No. 96-113, 12 FCC Rcd 16802, 16930 ¶221 (1997) ("Section 257 Report").

Supreme Court held that a law school has a compelling interest in attaining a diverse student body, endorsing the view that student body diversity "promotes 'cross-racial understanding,' 'helps to breakdown racial stereotypes,' and 'enables [students] to better understand persons of different races.'" 15/ The Supreme Court also noted that a "critical mass" of under-represented minorities was necessary in the law school to ensure the educational benefits of student body diversity. 16/ Like the law school at issue in *Grutter*, our nation's airwaves provide a platform over which the public at large - minorities and non-minorities alike - receive information, form opinions and prepare for participation in the nation's civic life. Indeed, the need to ensure that the viewpoints of minorities are aired over our airwaves is in many ways more compelling than the need to ensure that they are aired in institutions of higher learning because the airwaves, as compared to our nation's universities, are accessed by magnitudes greater numbers of people. The pervasiveness of spectrum-based communications (and the ability of these communications to dramatically affect what individuals hear, see and believe) make the airwaves a powerful medium for informing people regarding the issues of concern and viewpoints of people with whom they might not, on account of geographic, cultural, economic or other barriers, come into contact. If all individuals attending institutions of higher learning are enriched when outlets for the dissemination of minority viewpoints are available, then it is clearly the case that the public as a whole is enriched when outlets for such views are available over our nation's airwaves. 17/

15/ *Grutter*, 539 U.S. at 330.

16/ *Id.* at 333 (internal citations omitted).

17/ This is true not only for use of the airwaves for broadcasting, but also for use of the airwaves for wireless. With the advent of broadband wireless and the dissemination of video and audio content over high-speed wireless platforms, wireless providers will increasingly be involved in delivering programming content to their subscribers.

As explained in more detail in the Hammond, Sandoval Declaration, a number of studies demonstrate that a strong nexus exists between minority ownership and sensitivity to and appreciation for minority view points. 18/ For example, the Content/Ownership Study found that minority ownership of a radio station, and minorities working in the newsroom, predicted a greater attention to news and public affairs programming tailored to minority audiences. 19/ The study found that minority ownership makes a difference in content, and minority owners are significantly more likely than their majority counterparts to program to minority or ethnic audiences, provide news and public affairs information responsive to their audiences' needs, and tailor national news stories to minority or ethnic community concerns. 20/ The study, like many others discussed in the Hammond, Sandoval Declaration, demonstrates that minority ownership must be promoted in order to achieve a true diversity of viewpoints that will both respond to the needs of minority communities, and inform the dialogue of all communities.

As the Commission has noted, "diversity of ownership fosters diversity of viewpoints, and thus advances core First Amendment principles." 21/ The connection between diversity of media ownership and diversity of ideas and expression protected by the First

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18/ *See* Hammond, Sandoval Declaration at 1-23. ; *see also* Henderson Declaration at 40-42.

19/ Content/Ownership Study at 33-36.

20/ *Id.*

21/ *In re 1998 Biennial Regulatory Review-Review of the Broadcast Ownership Rules and Other Rules*, 15 FCC Rcd. 11058, 11062 (2000). "Viewpoint diversity refers to the range of diverse and antagonistic opinions and interpretations presented by the media." *Id.* In addition, the FCC has stated that "[p]romoting diversity in the number of separately owned outlets has contributed to our goal of viewpoint diversity by assuring that the programming and views available to the public are disseminated by a wide variety of speakers." *Id.*

Amendment has long been recognized by the courts. 22/ The Content/Ownership Study, and other studies cited in the Hammond, Sandoval Declaration, document beyond a doubt the nexus between minority ownership and minority viewpoint that has long been assumed to exist. 23/

B. Remedying the Effects of Past and Present Discrimination

The Supreme Court has recognized that the government has a compelling interest in remedying the effects of past and present discrimination. 24/ Although the Supreme Court has indicated that remedying "general societal discrimination" is too amorphous to represent a compelling interest 25/, it consistently has held that remedying identified discrimination related

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22/ *See, e.g., TV 9, Inc. v. FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973); *Citizens Communications Ctr. v. FCC*, 447 F.2d 1201, 1213, n.36 (1971).

23/ Although Justice O'Connor disagreed with this correlation in *Metro Broadcasting, Inc. v. FCC*, her disagreement would be tempered by an evidentiary record demonstrating the validity of such a correlation. 497 U.S. 547, 620 (1990) (O'Connor, J. dissenting). As noted above, the Content/Ownership Study documents a link between minority ownership and minority programming, addressing Justice O'Connor's concern that minority owners were being stereotyped as providing minority programming by showing that most do. *See also* Advertising Study at 23 (revealing that 75% of minority broadcasters program in formats that are specifically labeled as targeting minorities. Of the 25% of minority broadcasters that program in other formats, many have changed their format names or labels to avoid the stigma associated with minority-formatted labels. *Id.* at 78, n.210. The Content/Ownership Study also provides evidence that minority owners produce something different from what is produced by non-minority owners: programming more directly tailored to the minority community in news and public affairs, a core concern of competition in the marketplace of ideas for our First Amendment-based dialogue. Moreover, Justice O'Connor's concern goes more to narrow tailoring than to whether a governmental interest in promoting viewpoint diversity is compelling. *See Grutter*, 539 U.S. at 341. The Content/Ownership Study answers Justice O'Connor's narrow tailoring concern by showing that race-neutral means to promote broadcast diversity, without promoting minority ownership, would not yield the same results in terms of news and public affairs tailored to the needs of minority communities.

24/ *See Fullilove v. Klutznick* 448 U.S. 448, 456-467, 480-489 (1980).

25/ *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986) (plurality opinion).

to the subject of the measures is compelling. 26/ The Supreme Court, and lower courts applying its precedent, have held that governmental entities have a compelling interest in remedying their own discrimination and any continuing effects, as well as discrimination on the part of other actors in an industry or market in which the government has acted as a "passive participant." 27/

1. Governmental Discrimination

It is beyond question that a governmental entity has a compelling interest in remedying discrimination and the effects of past discrimination in which it has engaged. For example, where a government has discriminated in contracting or employment, it has a compelling interest in remedying that discrimination and any continuing effects. 28/ In order to establish such an interest, a government need not concede its liability, 29/ but must only establish "a strong basis in evidence" that discrimination has occurred. 30/ This showing need not constitute conclusive proof of discrimination and its effects; all that is needed is evidence that presents something approaching a prima facie case, or initial showing of the likelihood, that discrimination has occurred. 31/

26/ *See Grutter*, 539 U.S. at 328.

27/ *See, e.g., Croson*, 488 U.S. 491-93, 498-506.

28/ *Id.* at 509.

29/ *See Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 630 (1986); *id.*, at 650, 652 (O'Connor, J., concurring in judgment); *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring in part and concurring in judgment).

30/ *Wygant*, 476 U.S. at 277.

31/ *Croson*, 488 U.S. at 500, 501-02; *see also Concrete Works of Colorado, Inc. v. City & County of Denver*, 321 F.3d 950, 971 (10th Cir. 2003)("*Concrete Works*").

A showing of a compelling interest in remedying discrimination is commonly made through statistical disparities between those members of a particular race employed or contracted by the entity and availability of the members of that race for the employment or contracting at issue in the market. 32/ Such statistical analyses need not conclusively demonstrate discrimination or disprove other theories for the existence of such disparities. 33/ Other forms of direct and circumstantial evidence may also be used to establish a basis for remediation. 34/

Where a government has made such an initial showing of discrimination, any challenger to its remedial measures bears the burden of proving that the government's "evidence did not support an inference of prior discrimination and thus a remedial purpose. 35/ A party challenging the government's showing "must introduce 'credible, particularized evidence to rebut [that] initial showing of the existence of a compelling interest.'" 36/

Several of the Section 257 studies analyze whether there has been such a disparity in the utilization of minorities in terms of their ability to secure spectrum licenses from the FCC as to constitute a prima facie showing of discrimination. The studies use unusually narrow

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32/ *Croson* at 500; *Johnson*, 480 U.S. at 631-32; *id.*, at 651-52 (O'Connor, J., concurring in judgment); *Wygant,* 476 U.S., at 277.

33/ *Croson* at 500, 501-02; *Concrete Works*, 321 F.3d at 991.

34/ *Croson*, 488 U.S. at 509; *Johnson* at 633 n. 11; *id.*, at 652-53 (O'Connor, J., concurring in the judgment); *Concrete Works* at 958.

35/ *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1166 (10th Circuit 2000)("*Adarand*") (*quoting Concrete Works of Colorado, Inc. v. City & County of Denver*, 36 F.3d 1513, 1522-23(10th Cir. 1994)(quoting *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring)); *Wygant*, 476 U.S. at 277-78 (plurality opinion); see *Johnson*, 480 U.S. at 626.

36/ *Concrete Works*, 321 F.3d at 959 (*quoting Adarand*, 228 F.3d at 1175).

definitions of availability, examining the relative success rates of applicants who participated in license competitions, or the rate at which minorities and women who expressed an interest in Commission license proceedings qualified to participate. These definitions are significantly narrower than those used in other studies in the wake of *Croson* and *Adarand* that compared minority utilization rates to the qualified population in the relevant local market. Because there are no set criteria to qualify as an FCC licensee, rather than use a broader definition of comparison to the population, the Commission investigators created narrow definitions focused on the actual competition. Their findings, however, provide evidence that even using these narrow definitions, minorities are underutilized in the Commission licensing process unless race is taken into account.

The Auction Utilization Study found in its analysis of FCC wireless license auctions that at a statistically significant level, minority and women applicants were less likely to win at least one license relative to other applicants, measured by the percentage of auction winners (those who obtained at least one license) among all auction applicants. 37/ The Auction Utilization Study also found that minority and women applicants qualified to participate in the auctions at lower rates than other applicants, and that those differences were statistically significant. 38/

The Broadcasting Licensing Study was designed to analyze disparities in the awarding of broadcast licenses by the Commission. The Broadcasting Licensing Study

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37/ Auction Utilization Study at 4; *see* Henderson Declaration at 30.

38/ *Id.* Minorities and women who had filed preliminary forms indicating their interest in participating in the auctions were less likely to submit the required upfront payments to qualify to participate.

encompassed 1978-1981 and 1989-1993, periods during which the Commission considered the participation of minorities or women as a "plus" in an application for a broadcast license in a comparative hearing judging the relative merits of applications for the same license.

For the time period analyzed, the Broadcasting Licensing Study determined the "disparity ratio," defined as the percentage of applicants winning broadcast licenses divided by percentage participation. Disparity ratios of less than 1.0 indicate underutilization. The study found that when race and gender was considered as a factor in comparative hearings, the disparity ratio for radio licenses was .96 for Hispanics and .40 for American Indians, whereas it was 1.00 for Whites, 1.14 for African-Americans and 1.33 for Asians. In television, only Whites and American Indians showed disparity ratios of less than 1.00; the ratio was .98 for Whites and .67 for American Indians. 39/ One could conclude from this data that the FCC minority preferences were more effective for African-Americans in winning radio and television licenses than they were for Native Americans and Hispanics.

The Henderson Declaration explores in depth the prospects for supporting a compelling interest in remedying past discrimination, and indicates that:

> The "Broadcasting Licensing Study," "Auction Utilization Study," "Capital Markets and Auctions Regression Study," "Historical Study" and the Advertising Study" considered in light of the history and impact of FCC policies and practices, together with evidence regarding the broadcasting and wireless industries, suggest that the FCC clearly has a compelling interest in remedying discrimination regarding license ownership. 40/

39/ *See* Broadcasting Licensing Study (Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC), KPMG LLP, Economic Consulting Services, November 2000, Table 9, p. 25.

40/ Henderson Declaration at 11.

With respect to such compelling interest, the Henderson Declaration notes that the FCC plays a much more central role in the organization and governance of the broadcast and wireless industries than a government agency would typically play, for example, in a minority procurement or contracting context. Instead of merely being a consumer of services, the FCC operates as the regulator of the broadcast and wireless industries (a public spectrum trustee), and "has the ability to influence the means by which individuals gain experience and training for, or entry into, these industries." 41/ The Henderson Declaration also notes that "other than the choices of individuals, the racial and ethnic composition of owners and participants in the broadcast and wireless industries is the result of decisions of the FCC, its licensees and those adjunct to these industries, such as lenders, brokers, advertisers and others." 42/ Although we will not recite here all of the points raised in the Henderson Declaration regarding the Section 257 studies and their relevance to whether race-conscious policies can be justified as a means for remedying discrimination (the full text of the declaration can be found at Attachment A), some of its more salient observations are worth noting:

- The studies show that the FCC has unfortunately licensed entities that discriminated against minorities on the basis of race in employment, did not act to correct or eliminate these practices and resisted activity by public interest organizations and the courts to enforce its rules against such discrimination. 43/
- The studies (and otherwise available information) show that the FCC did not adopt any policies prohibiting discrimination until 1969, fifteen years after *Bolling v. Sharp* 44/ applied the holding of *Brown v. Board of Education* 45/ to

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41/ *Id.*

42/ *Id.*

43/ *Id.* at 14-15.

44/ 347 U.S. 497 (1954)

federal decision-making and five years after passage of the Civil Rights Act of 1964; such policy merely prohibited discrimination in employment and the FCC failed to adequately enforce such policy by undertaking any affirmative investigative efforts. 46/

- In its broadcast licensing proceedings, the FCC refused to provide a credit for prospective minority ownership until forced to do so by the courts. 47/

- If policies adopted by the FCC in the 1970s giving a preference to incumbents in the broadcast license renewal process had been allowed to stand, such policies would have operated to maintain the low level of minority ownership of broadcast licenses that existed on account of previous discrimination. 48/

- The FCC did not institute a formal minority ownership policy until 1978. Moreover, the policy that was implemented to promote "diverse selection of programming," and not to remedy the effects of prior discrimination. 49/ Interestingly, until it commissioned the Section 257 studies the FCC had never formally conducted an inquiry into whether past or present practices of it or its licensees had been discriminatory or presented discriminatory barriers to minority participation. 50/

- The Broadcasting Licensing Study reports data demonstrating that minority participation in the broadcasting industry is very low relative to the percentage of minorities in the general population. For example, the study shows that minority representation in the licensing process was only 8.9%, compared to representation of 23.8% in the general population. The data shows that Whites are disproportionately over-represented in the licensing process (i.e., Whites participated in the licensing process at a rate of 119.5% of their representation in the general population). 51/

45/ 347 US 483 (1954).

46/ *Id.* at 16.

47/ *Id.* at 17.

48/ *Id.* at 17-18.

49/ *Id.* at 19.

50/ *Id.* at 20.

51/ *Id.* at 22.

- The Broadcasting Licensing Study suggests that minorities were disproportionately under-represented in terms of the amount of equity they controlled in successful broadcast licensing applicants, and that non-minorities were significantly over-represented. 52/

- The Broadcasting Licensing Study concluded that minority participation in FCC broadcast comparative hearings was low relative to minority representation in the general population. 53/

- The Broadcasting Licensing Study shows that the FCC's comparative hearing licensing process failed to adequately give credit to minority-controlled license applicants, as compared to applicants with nominal minority participation. 54/ The effect of such process was to encourage the recruitment of minorities to participate in the ownership of licensing applications controlled by non-minorities in order to enhance the prospects for non-minority firms in the licensing process, instead of increasing the number of minority-controlled applicants securing licenses. 55/

- The Broadcasting Licensing Study concludes that FCC minority ownership policies had little, if any, effect on the rate at which minorities received licenses. 56/

- The Auction Utilization Study shows that in auctions without installment payment plans, minorities obtained spectrum licenses at statistically significant lower rates than non-minorities; however, in auctions with installment payment plans, minorities obtained licenses at statistically significant higher rates than non-minorities. These findings suggest that discrimination in access-to-capital is a significant barrier to minority participation and where access to capital is eased minorities are better able to acquire spectrum licenses. 57/

52/ *Id.* at 24.

53/ *Id.* at 22.

54/ *Id.* at 27.

55/ *Id.* at 27-29.

56/ *Id.* at 29.

57/ *Id.* at 31. In addition to delineating study findings that support a compelling interest in remedying the effects of direct FCC or passive participation discrimination, the Henderson Declaration notes obvious omissions in the various Section 257 studies that should be remedied in order to provide a fuller picture of the discrimination faced by minorities:

These and other observations delineated in the Henderson Declaration make clear that a sufficient basis exists for the FCC to consider implementing race-conscious policies as a means of remedying past administrative process discrimination.

2. Passive Participation

Governmental units also have a compelling interest in remedying discrimination where it has not been the discriminatory actor, but has been a participant in a market or industry in which discrimination has adversely affected the opportunities of minorities. This is often referred to as "passive participation," and proceeds from the principle that the government has a compelling interest in ensuring that public funds, resources and opportunities are not used in a

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- The Broadcasting and Licensing Study does not seek to determine whether there was discrimination in the FCC's licensing process during the many decades prior to the establishment of FCC minority ownership policies. *Id.* at 13, 21. There is significant information available documenting the government-wide and industry-wide discrimination that occurred during that period.

- The Broadcasting and Licensing Study does not compare the rate of successful minority license applicants during periods where the minority policy was in effect against the percentage of minorities in the population who were "ready willing and able" to seek licenses, as is traditionally done where possible remedial efforts are being considered. *Id* at 21-22.

- The Broadcasting and Licensing Study fails to measure whether minority participation in the licensing process was actually affected by the FCC's minority ownership policies. In other words, the study failed to compare the rates at which minorities participated in the FCC's licensing process during the period of its minority ownership policies to participation during periods where no such policies were in effect. *Id.* at 23. As noted above, there is significant evidence that it did not.

- The Broadcasting and Licensing Study does not analyze license transactions in the secondary market, *id.* at 26, where, based on anecdotal evidence, it appears that discrimination occurs.

discriminatory manner, and do not fuel, promote or perpetuate discrimination or the continuing effects of past discrimination. 58/

Discrimination in markets and industries includes, first, that which adversely affects the ability or opportunity of minorities to qualify or participate in fields of endeavor, often referred to as discrimination affecting "business formation," and, second, discrimination affecting the "utilization" of existing minority businesses or barriers to the ability of those businesses fairly to compete in the market. 59/ Forms of discrimination recognized to affect business formation include denial of access to capital, exclusion from racially segregated industry networks, such as "old boy" or family connections to opportunities, and discrimination in access to training, experience and exposure that can lead to participation in, or qualification for entry into, the industry, such as discrimination in union or employment opportunities. 60/ Forms of discrimination recognized as affecting the utilization of minorities or their ability to compete in the market include exclusion from contracting opportunities with others in the industry, avoidance of doing business with minorities, for example, through "bid shopping" for non-minority associates, discrimination by suppliers in pricing and access to materials or resources, and discrimination in access to surety bonds or financing. 61/

58/ *Croson*, 488 U.S. at 492-93 citing *Norwood v. Harrison*, 413 U.S. 455, 465 (1973); *id.*, at 509.

59/ *Adarand*, 228 F.3d at 1167-72; *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F. 3d 964, 970 (8th Circuit 2003).

60/ *See Adarand*, 228 F.3d at 1168-70; *Concrete Works*, 321 F.3d at 964-65, 967, 977-78, 990-91.

61/ *See Adarand* at 1170-75; *Concrete Works* at 962-67, 968-69.

Where evidence of these forms of discrimination has been demonstrated, courts have found a strong basis in evidence of the compelling interest in remedying discrimination, and have approved narrowly tailored means for considering race in decisions regarding participation in contracting and employment involving government resources. 62/

These principles apply with equal force here. The history and impact of FCC policies and practices, along with evidence from the broadcasting and wireless industries, affirms the compelling interest in remedying industry-wide discrimination countenanced or ignored by the FCC that has made it more difficult for minorities to secure and maintain spectrum licenses.

Most broadcast and wireless licenses are currently obtained in the secondary market; after the original license is conferred by the FCC, the licensee may sell or trade the license at a value it determines, with the approval of the FCC and the Department of Justice where antitrust concerns are raised. As noted above, the Section 257 studies did not examine the secondary market for spectrum licenses. This was an extremely unfortunate omission because for more than 50 years the secondary market has been the most significant source of broadcasting licenses and was essentially the only way to secure a commercial wireless license during the period between the cellular lotteries of the 1980s and the PCS auctions of the mid-1990s. The secondary market is particularly important because there are no requirements that licensees advertise that a license is for sale or make any commitments regarding their treatment

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62/ *See, generally, Adarand; Concrete Works; Sherbrooke Turf;* Northern Contracting, Inc. v. the State of Illinois, 2004 WL422704 (N.D. Ill. March 3, 2004).

of would-be competitors for such a license. 63/ Absent such procedural safeguards, old boy networks, 64/ capital markets which may charge minorities higher interest rates than their similarly situated counterparts and other practices come into play that affect who is able to obtain a license in the secondary market. 65/ The FCC then ratifies these transactions by approving the license assignment or transfer. The Commission should study the secondary market to ensure that it is not unwittingly condoning discriminatory practices in approving such transactions.

Other forms of direct and circumstantial evidence may be used to establish a strong basis in evidence for past or present discrimination within the broadcast and wireless industries. Anecdotal evidence can make important contributions to understanding the manner in which discrimination operates, but alone will rarely suffice to establish a sufficient showing.

63/ The FCC's Failing Station Solicitation Rule ("FSSR") is a very modest exception to this practice that has worked well to afford minorities a better chance of learning about the sale of a failing station. Nevertheless, the Commission voted to repeal the rule in its 2002 *Biennial Review Decision. See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Notice of Proposed Rulemaking, MB Docket No. 02-277 *(Report and Order and Notice of Proposed Rulemaking)*, 18 FCC Rcd 13620 (2003).

64/ *See* Historical Study. Minorities interviewed for the study discussed how their exclusion from old boys networks limited information about possible deals. *Id.* at 57. The authors contrasted those experiences to white licensees who reported how helpful their industry colleagues were in obtaining information about opportunities. *Id.* at p. 58. One African-American broadcaster reported that after Congress' removal of the tax certificate program in 1995, she attempted to find out about the availability of stations for sale. She was told they were not available or were being sold at prices she found irrational. She asked a friend to make similar inquiries, as housing discrimination testors do, and the friend was given different information about availability and price. *Id.* at 55.

65/ *See* Capital Markets and Auctions Regression Study. This study found that minority broadcast and wireless license holders were less likely to receive debt financing in capital markets than non-minority-owned firms, after controlling for the effect of other variables on the lending decision. A statistically significant finding was also made that minority broadcast and wireless borrowers paid higher interest rates on their loans, after controlling for the impact of other variables.

The Section 257 studies provide significant anecdotal evidence of practices in the communications industry, including the advertising industry, which is the financial lifeblood of non-subscription based communications services, that negatively affect minority spectrum license owners. These practices include "No-Urban or No-Spanish dictates," whereby advertisers declare that they will not advertise on stations targeting minority communities, regardless of station ratings or ad prices, 66/ and the use of minority advertising discounts. 67/ Many entities interviewed by the authors of the studies also complained of practices that limited

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66/ *See* Advertising Study at 8. Ninety-one percent of the minority broadcasters surveyed reported that they had encountered dictates not to buy ads on their station. *Id.* at 13. A general manager at an African-American owned and formatted radio station in New York reported that many potential sales accounts regularly tell their salespeople "no urban dictates," meaning they are not buying time on minority-oriented stations. *Id.* at 29. These dictates are often based on stereotypes or perceptions that run counter to actual consumption data such as "Black people do not buy linens," or "Hispanics don't bathe as frequently as non-Hispanics" or "Hispanics don't buy or lease cars." Id. at 29, 41. A memo prepared by Katz Media Group, a firm representing certain broadcasters in their attempts to gain advertisement placements, counseled broadcasters targeting white audiences on how to compete against minority-formatted stations, including those who had better ratings. It encouraged majority-serving broadcasters to emphasize that their audience brought advertisers "prospects, not suspects." Id. at 30-31. *See also* FCC Historical Study at 59-63 for anecdotes regarding the disparity minority-owned and formatted stations often face between ratings and revenues, where their high ratings are not reflected in the advertising dollars earned.

67/ *See* Advertising Study at 12-13; Henderson Declaration at 39.

their access to capital. 68/ They also reported exclusion from information about deals or old-boy networks that affected their ability to compete for or obtain licenses. 69/

One African-American broadcaster reported that he received death threats from the Klu Klux Klan when he attempted to erect his tower to transmit a radio signal featuring programming targeted at African-Americans. 70/ Others reported that potential advertisers told them they didn't want "Niggers" in their place of business, and declined to place ads or did so only reluctantly. 71/

The anecdotal evidence about lack of access to capital complements the statistical evidence contained in the Capital Markets and Auctions Regression Study, which analyzes communications industry lending showing that minorities are less likely to obtain loans in the

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68/ *See* Historical Study at 17-51, including contrasts between minority broadcasters who were unable to obtain bank loans despite their business experience and standing in the community, and white broadcasters who reported they never had problems with the banks who invested in their radio stations because of their standing in the community. Id. at 22-23. Hispanic broadcaster Tom Castro reported in the FCC Advertising Study that practices of paying his station less for commercials, or excluding them from consideration, reduces his profits, making it more difficult to invest in his stations or compete to buy new stations. Advertising Study at 22. *See also* Henderson Declaration at 37-39.

69/ Historical Study at 57-58. *See also* Henderson Declaration at 39-40.

70/ Historical Study at 50-51.

71/ African-American broadcaster James Wolf reported that the comment about not wanting "Niggers" in the advertiser's store happened in the year preceding the interview conducted the Historical Study. *Id.* at 59. An African-American broadcaster reported that potential advertisers told his white account executives that "We don't want those kinds of folks in our business," referring to the predominantly African-American station audience. *Id.* An Hispanic broadcaster reported that an account executive at Macy's refused to buy ads on their Spanish-language stations because "their pilferage rates will increase." FCC Advertising Study at 46. Another broadcaster targeting the African-American community was plainly told by a potential advertiser, "Your station will bring too many black people to my place of business." *Id.*

communications industry, 72/ and are charged higher rates when they do. 73/ It also supports study findings showing that minorities and women were less likely to obtain wireless licenses in auctions without provisions taking race or gender into account, and that the lack of installment payments reduced their likelihood of success even further. In sum, there is powerful evidence in the current record of past and present industry-wide discrimination faced by minority spectrum license seekers and licensees. This evidence, which is delineated in more detail in the Henderson and Hammond, Sandoval declarations, provide a strong basis for pursuing race-conscious measures to increase minority ownership.

C. Promoting Universal Service

One of the most important principles underlying modern communications regulation is the principle of universal service. In this respect, the Commission's interest in promoting universal service should be seriously considered in identifying potential compelling governmental interests justifying race-conscious policies to increase minority ownership.

Section 151 of the Communications Act makes clear that the Commission was created:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges.* 74/

72/ Capital Markets and Auctions Regression Study at pp. vii, 19-20; Henderson Declaration at 35-37.

73/ Capital Markets and Auctions Regression Study at pp. vi-vii, 16-17; Henderson Declaration at 35-37.

74/ *See* 47 U.S.C. §151 (emphasis added).

In the most recent major amendment to the Communications Act, the Telecommunications Act of 1996, Congress once again emphasized the importance of promoting universal service. The preamble to the conference report accompanying the Telecommunications Act states that the purpose of the Act is to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced service and information technologies and services to all Americans . . ." 75/

Moreover, a provision of the Telecommunications Act, codified at 47 U.S.C. §254(b)(3), states:

> Consumers in all regions of the Nation, including low-income consumers . . . should have access to telecommunication and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas. 76/

Finally, in Section 706 of the Telecommunications Act, codified at 47 U.S.C. §157 nt, Congress mandated that the Commission and each state with regulatory authority over telecommunications services "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" and remove barriers to such deployment where necessary and in the public interest. 77/

The Commission has implemented Congress's directives with respect to universal service in myriad ways, always cognizant of the fact that the concept of universal service must,

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75/ H.R. Rep. No. 458, 104th Cong, 2d Sess. 1 (1996).

76/ *See* 47 U.S.C. §254(b)(3).

77/ *See* 47 U.S.C. §157 nt.